The opinion in support of the decision being entered today was *not* written for publication and is *not* precedent of the Board.

Paper No. 16

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

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Ex parte JENO PAULUCCI

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Appeal No. 1997-2960
Application 08/368,897

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ON BRIEF

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Before WARREN, OWENS and ROBINSON, *Administrative Patent Judges.*

OWENS, *Administrative Patent Judge.*

DECISION ON APPEAL

This is an appeal from the examiner's final rejection of claims 1-4, which are all of the claims in the application.

THE INVENTION

Appellant claims processes for microwave heating of a frozen meal in a container, where a food component is removed from the container after a first heating period and prior to a

second heating period of additional food contents of the container. Claim 4 is illustrative and reads as follows:

4. A process for microwave heating a pre-packaged, frozen entree, the pre-packaged frozen entree exhibiting improved taste or appearance characteristics after heating, the process comprising:

providing the pre-packaged frozen entree in a container, the frozen entree having at least two food components, each food component being discretely and loosely frozen;

heating the food components with microwave radiation for a first selected time interval;

removing one of the food components from the container; and heating the food components that remain in the container with microwave radiation for a second selected time interval, wherein each of the food components is heated to a selected degree so that each of the food components does not experience a decrease in taste or appearance characteristics that would result from over-heating.[1]

THE REFERENCES

Bliley	2,768,086	Oct. 23, 1956
Mattson et al. (Mattson)	5,077,066	Dec. 31, 1991

[1] By "discretely" appellant means that "the food components are not frozen intermixed in the container but are frozen as individual units", and by "loosely" appellant means that "the food components are not packaged in separate bags or pouches and are generally unconfined except for the walls and divider of the container" (specification, page 3, lines 22-26).

THE REJECTION

Claims 1-4 stand rejected under 35 U.S.C. § 103 as being unpatentable over Bliley in view of Mattson.

OPINION

We have carefully considered all of the arguments advanced by appellant and the examiner and agree with appellant that the aforementioned rejection is not well founded. Accordingly, we reverse this rejection.

Bliley discloses a process for preparing a precooked frozen food package where the food includes a starchy food and a condiment or sauce (col. 1, lines 15-21). In this process, "the starchy food and the condiment or sauce portion are separately prepared and cooked. The sauce portion is then placed in a hermetically sealable package and it is frozen. After the sauce portion is frozen, the starchy food is superposed on the frozen sauce so as to fill the package. The entire package may then be frozen and hermetically sealed" (col. 2, lines 13-19).

The examiner relies upon only the "Background of the Invention" section of Mattson (answer, page 7). This section

discloses that it was known in the art to separately pouch each of the main constituents of a frozen meal for separate microwave heating of each, and was known that the heating sequence was complex in that each constituent requires a different heating time and/or preparation (col. 2, lines 40-49).

The examiner argues that because Bliley discloses keeping components of a frozen meal separate without the use of pouches, and Mattson discloses different microwave heating times for different pouches of food, it would have been obvious to one of ordinary skill in the art to use different microwave heating times for components of a frozen meal which are not in pouches by removing a component from the meal before the completion of the heating of other components (answer, pages 8-10).

In order for a *prima facie* case of obviousness to be established, the teachings from the prior art itself must appear to have suggested the claimed subject matter to one of ordinary skill in the art. *See In re Rinehart*, 531 F.2d 1048, 1051, 189 USPQ 143, 147 (CCPA 1976). The mere fact that the

prior art could be modified as proposed by the examiner is not sufficient to establish a *prima facie* case of obviousness. *See In re Fritch*, 972 F.2d 1260, 1266, 23 USPQ2d 1780, 1783 (Fed. Cir. 1992). The examiner must explain why the prior art would have suggested to one of ordinary skill in the art the desirability of the modification. *See Fritch*, 972 F.2d at 1266, 23 USPQ2d at 1783-84.

The examiner has not explained why the combined teachings of the applied prior art references would have fairly suggested, to one of ordinary skill in the art, the modification proposed by the examiner. Bliley desires to cook for the same time period all of two separately frozen portions of the contents of a hermetically sealed container (col. 3, lines 70-74). The examiner has not explained why Mattson's teaching regarding the use of pouches would have led one of ordinary skill in the art to remove a portion the contents of Bliley's container, which apparently would be the upper, starch food portion, prior to the completion of the heating of other contents of the container, which apparently would be the lower, condiment or sauce portion. Also, the examiner has not

explained why Bliley's teaching of separately freezing starchy food and condiment or sauce portions would have fairly suggested, to one of ordinary skill in the art, eliminating the prior art pouches discussed by Mattson and removing part of the food from the container prior to the completion of the heating of the other portion. The motivation relied upon by the examiner for modifying the teachings of the prior art to arrive at the claimed invention comes only from appellant's disclosure of his invention in his specification. Thus, the examiner used impermissible hindsight when rejecting the claims. *See W.L. Gore & Associates v. Garlock, Inc.*, 721 F.2d 1540, 1553, 220 USPQ 303, 312-13 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984); *In re Rothermel*, 276 F.2d 393, 396, 125 USPQ 328, 331 (CCPA 1960). Consequently, the examiner's rejection is reversed.

DECISION

The rejection of claims 1-4 under 35 U.S.C. § 103 over Bliley in view of Mattson is reversed.

REVERSED

CHARLES F. WARREN Administrative Patent Judge	)	
TERRY J. OWENS Administrative Patent Judge	)	BOARD OF PATENT APPEALS AND INTERFERENCES
DOUGLAS W. ROBINSON Administrative Patent Judge	)	

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